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1959
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Supreme Court of the United States

October Term, 1959.

No. 423

SCHWEGMANN BROTHERS GIANT SUPER MARKETS,
Appellant,

versus

SIDNEY J. McCRORY, COMMISSIONER OF AGRICULTURE AND IMMIGRATION OF THE STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of the State of Louisiana.

JURISDICTIONAL STATEMENT.

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IN THE SUPREME COURT OF THE UNITED STATES.

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SCHWEGMANN BROTHERS GIANT SUPER MARKETS,
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Appellee.

On Appeal from the Supreme Court of the State of Louisiana.

JURISDICTIONAL STATEMENT.

STATEMENT AS TO JURISDICTION.

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on an appeal to review the final decree of the Supreme Court of Louisiana in question, and should exercise such jurisdiction in this case.

OPINION BELOW.

Schwegmann Brothers Giant Super Markets appealed to the Supreme Court of Louisiana a judgment of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, dismissing petitioners' application to enjoin enforcement of price control legislation affecting milk. The Supreme Court of Louisiana affirmed the lower court's decision for the defendant. The decision of the Louisiana Supreme Court is reported under the title *Schwegmann Brothers Giant Super Markets v. McCrory*, 112 So. 2d 606 (La. 1959). A copy of this decision is also annexed hereto as Appendix A.

JURISDICTION.

The appeal herein is from a final decree made and entered by the Supreme Court of the State of Louisiana refusing to grant petitioner an injunction against the Commissioner of Agriculture and Immigration restraining enforcement of provisions of the so-called Orderly Milk Marketing Act, Act 193 of 1958 of the Louisiana Legislature.

The case was decided June 1, 1959 and a petition for rehearing was denied June 25, 1959. Notice of appeal was filed in the Louisiana Supreme Court on September 21st, 1959.

The Supreme Court of the United States has jurisdiction to review by appeal the judgment and decree complained of by the provisions of 28 U.S.C. §1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Winters v. People of State of New York*, 333 U.S. 507 (1948); *Atchison T. & S.F. Ry. Co. v. Public Utilities Commission of Cal.*, 346 U.S. (Cal. 1953).

QUESTIONS PRESENTED.

Act 193 of the Louisiana Legislature of 1958 provides for the establishment of minimum prices in the dairy industry by authorizing the Commissioner of Agriculture to fix minimum prices which go into effect when approved by two-thirds of the producers in a given market area, the extent of which is defined by the Commissioner. The act also creates a series of crimes. Certain trade practices, such as receipt of quantity discounts, are prohibited as "disruptive" and made misdemeanors. The Commissioner of Agriculture is further authorized to define and prohibit other practices which he considers "disruptive." In each case the state need merely show the *doing* of the act and it is *presumed* that the act was done with intent to unfairly divert trade from competition or to destroy competition. For example, the retailer must sell at invoice cost plus the cost of doing business. As the cost of doing business is presumed to be 8%, the retailer must bear the burden of proof to rebut the statutory presumption if he is accused of selling below cost.

The Louisiana Supreme Court held that Act 193 did not violate the Due Process guarantee of the United States Constitution.

The principal questions presented are:

(1) Whether Act 193 of 1958 creates a presumption of guilt in violation of the Due Process guarantee of the Fourteenth Amendment to the United States Constitution.

(2) Whether it violates the Due Process guarantee by virtue of being arbitrary, unreasonable and inappropriate for its alleged purpose.

(3) Whether it violates Due Process as an unlawful delegation of legislative power.

STATUTE INVOLVED.

The statute involved is Act 193 of 1958, also known as R.S. 40:940, a copy of which is set forth in Appendix B.

STATEMENT OF THE CASE.

The ostensible purpose of most state statutes regulating the milk industry is to protect the consumer by assuring the availability of an ample supply of good milk at reasonable prices. State regulations have generally been of two types: (1) the establishment of sanitary and health standards; and (2) the economic regulation of marketing and distribution. All states have adopted statutes relating to health and sanitation. A number of states have adopted statutes relating to marketing and distribution. In testing statutes regulating the marketing and distribution of milk, state courts have differed greatly as to the constitutionality of such economic regulation. The Louisiana statute involved in

this case eliminates competition at every level of the milk marketing process through mutifarious controls ranging from retail price fixing to regulation of credit and advertising. The statute implements these controls by creating a series of crimes based on violations and presumed violations of these controls. It also requires every housewife in Louisiana to pay an unnecessarily high price for every quart of milk she buys for her family in order to enrich a small segment of the industry which produces it.

Schwegmann Brothers, the plaintiff, is a partnership which operates three retail super markets in metropolitan New Orleans. Schwegmann has grown rapidly in the past few years and much of this growth has been generated by "minimum service merchandising." Customers are attracted to Schwegmann Brothers' stores because they offer uniformly low and reasonable prices. Schwegmann stays in business because it makes money selling at those prices.

Believing that Act 193 of 1958 violated the due process clauses of both the Louisiana and United States Constitutions, plaintiff-appellant filed a petition for injunction against Sidney J. McCrory, Commissioner of Agriculture and Immigration for the State of Louisiana, in the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana. The petition requested that defendant-appellee be enjoined from enforcing the provisions of Act 193 of 1958 against Schwegmann Brothers and its suppliers. A number of small dairies and distributors intervened on behalf of defendant-appellee.

On February 12, 1959 the district court rendered judgment for the defendant, dismissing Schwegmann Brothers' suit.

A suspensive and devolutive appeal was taken by Schwegmann Brothers to the Supreme Court of Louisiana. On June 1, 1959 the court affirmed the decision of the lower court. A petition for rehearing was denied June 25, 1959.

In both state courts, the plaintiff-appellant urged in the pleadings and in the arguments that Act 193 of 1958 violated the due process clause of the Fourteenth Amendment to the United States Constitution on grounds that the statute unlawfully: (1) creates a presumption of guilt; (2) is arbitrary, unreasonable, and inappropriate for its alleged purpose; and (3) delegates legislative power. However, the Louisiana Supreme Court held the act to be constitutional as appears in the annexed opinion.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. ACT 193 OF 1958 CREATES A PRESUMPTION OF GUILT IN VIOLATION OF THE DUE PROCESS GUARANTEE OF THE FOURTEENTH AMENDMENT.

It is fundamental that under our law one is innocent until proven guilty. The ability of a legislature to

create a presumption in favor of the state or to displace the burden of proof is strictly limited:

> "What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience." *Morrison v. People of State of California*, 291 U.S. 82, 90 (1934).

These rules and the relevant authorities were discussed by this Court in the recent *Speiser* case.

> "It is of course within the power of the State of regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Snyder v. Commonwealth of Massachusetts, 291 U. S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674. [O]f course the legislature may go a good way in raising * * * [presumptions] or in changing the burden of proof, but there are limits. * * * [*I*]*t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.* McFarland v. American Sugar Refining Co., 241 U.S. 79, 86 S.Ct. 498, 501, 60 L.Ed. 899. The legislature cannot place upon all defendants in criminal cases the burden of going forward with the evidence * * *. Tot v. United States, 319 U.S. 463, 469, 63 S.Ct. 1241, 1246, 87 L.Ed. 1519. Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant but only after the State has proved enough to make it just for the defendant to be required to repel what has been

> proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Morrison v. People of State of California, 291 U.S. 82, 88-89, 54 S.Ct. 281, 284, 78 L.Ed. 664. In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof. Western & A. R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884; cf. Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78."
>
> *Speiser v. Randall*, 357 U.S. 513 523-524, 78 S.Ct. 1332, 1341 (1958).

Yet the Louisiana legislature has created a series of new crimes (found in Sections 940.5 through 940.10 of Act 193) in which evil intent, necessary for the crime, is inferred from the doing of acts long customary and not ill-regarded in the retail and wholesale trade. It is presumed that the act, such as the granting of a discount, is done with intent to "unfairly divert trade from" or otherwise injure a competitior or destroy competition or create a monopoly, or else that the act accomplished one of these objects. Thus a guilty intent or destructive effect is *presumed* from the doing of certain acts which are not evil in themselves and from which no evil consequences logically flow. Even worse, the legislature has established a presumption, Section 940.2, that sales of goods at less than an eight percent mark-up are sales below cost, forbidden, except to meet *legal* competition, under Sections 940.5 and 940.7. This presumption, though arbitrary and unrealistic, is

well nigh impossible to rebut because of the practical difficulties involved in accounting and because of the vague nature of the legislature's definition of "cost". (See Appendices B and D.)

The fatal defect in the criminal provisions of Act 193 is the presumption of wrongful intent and injurious effect, from the mere doing of the act, regardless of motive or result. Yet the act does not purport to make it criminal merely to perform them; the prescribed intent or effect will be presumed from the mere doing of the act, regardless of whether it is done harmlessly or unintentionally. The retailer need neither know he has sold below cost nor cause any harm by the sale to be convicted for violation of a law which makes evil intent or effect an essential element of the crime. The retailer who is attempting to pass on to his customers the savings inherent in large volume, minimum mark-up merchandising is placed in a difficult position; he is in effect forced to raise his prices to the level of the established mark-up to be safe from prosecution. The umbrella placed over the inefficient producer is also expensive to the consumer and disruptive of an economy which is predominantly based on competition.

Just such presumptions of guilt have been specifically declared unconstitutional in comparable trade regulation statutes. See *Wiley v. Sampson-Ripley Co.*, 151 Me. 400, 120 A.2d 289 (1956) and *Great Atlantic & Pacific Tea Company v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938). Under consideration in the *Ervin* case was a Minnesota unfair trade practices act which made it a

crime for one to sell merchandise below cost with the intent to injure competitors or destroy or lessen competition. As in Louisiana Act 193 of 1958, the Minnesota statute provided that, in the prosecution of any violation of the act, the showing that the sale was at less than a certain mark-up above the manufacturer's list price, less published discounts, was not only prima facie evidence that the sale was a sale below cost, but also that the vendor who made the sale intended to injure competitors and destroy competition. In declaring that the entire statute was unconstitutional because of this provision, the Court stated:

> "Intent is something which is easily asserted and hard to disprove. To cast upon a merchant who has sold goods at less than ten per cent above their cost, the burden of establishing that the sale was not made with an intent to injure competitors or destroy competition, subjects him to unreasonable hardship. We think the disadvantage to him of the presumption of guilt should be regarded as outweighing the advantage of the presumption to the state."
>
> *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 F. Supp. 70, 82 (D. Minn. 1938).

The presumption of guilt in a criminal proceeding, to say nothing of the shifting of the burden of proof in possible civil proceedings involving treble damage exposures, violates due process guarantees of the Fourteenth Amendment.

B. ACT 193 OF 1958 VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE DRASTIC REGULATIONS IMPOSED BY THE STATUTE ARE ARBITRARY AND UNREASONABLE AND INAPPROPRIATE FOR THE ACCOMPLISHMENT OF ITS ALLEGED PURPOSE.

The judicial process has developed certain well-established rules to assure that no person will be deprived of any right or property without due process of law. Every legislative body must observe them in exercising its police powers through the enactment of laws. Appellant contends that Act 193 of 1958 violates these principles and denies appellant its constitutional right to due process. In the guise of eliminating "disruptive practices" in a competitive economy, it eliminates all forms of price competition, regulates the extension of credit, abolishes all co-operative advertising, and even forbids a manufacturer from promoting his product through demonstrations in retail outlets.

Proponents of statutory regulation of milk marketing and distribution almost invariably try to assert that the decision in *Nebbia v. People of State of New York*, 291 U.S. 502 (1934), was a judicial declaration in favor of *carte blanche* regulation of the milk industry. Such an interpretation is unjustified. However, the *Nebbia* case does articulate the requirements of due process of law in regulations of milk under the police powers of a state. The basic principles are: (1) any statute enacted under the police power must have some real, substantial and rational relation to the public safety or

general welfare, and (2) the working provisions of the law must not be arbitrary, unreasonable or capricious, and (3) the means selected to carry out the purpose of the law must bear a real and substantial relationship to the objects of the law. *Nebbia v. People of State of New York*, 291 U.S. 502 (1934).

The *Nebbia* case authorizes a state legislature to regulate the marketing and distribution of milk *under proven emergency conditions*. The decision relies primarily upon the exhaustive legislative study of the milk industry during the early depression years. Mr. Justice Roberts, the author of the *Nebbia* decision, restricts the decision to milk marketing and distribution "in the circumstances existing in New York in 1933." *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 262 (1936). And the counsel for New York State in the *Nebbia* case acknowledges that this was the only argument before the court. See Manley, *Nebbia Plus Fifteen*, 14 Albany L. Rev., No. 2, p. 11 (June 1949).

The statistics of the U. S. Department of Agriculture shows that the Louisiana Dairy Industry not only prospered before Act 193 was passed but consistently expanded in cash receipts, price per 100 lbs., and quantity of milk produced. See Appendix D.

The Louisiana legislature conducted no hearings or investigations of the effect of so-called "disruptive trade practices" on the production, distribution or marketing of milk. Since no legislative investigation was conducted, the official journals of the 1958 Legislature re-

flect no hearings, a fact of which this court may take judicial notice. *Gardner v. Barney*, 6 Wall. 499 (1868).

In *Fairmont Creamery v. State of Minnesota*, 274 U.S. 1, 8 (1927), the court held that a Minnesota statute which regulated certain trade practices similar to those regulated by Act 193 was a violation of Due Process under the Fourteenth Amendment. See also *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) and *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1931).

In 1957 the Supreme Court of North Dakota, in *Fairmont Foods Company v. Burgum*, 81 N.W. 2d 639 (1957), invalidated on constitutional grounds Chapter 303 of the 1955 Session Laws of that state, which was a statute purporting to regulate "unfair trade practice" in the dairy industry. The North Dakota statute was substantially the same as the Louisiana Act 193 of 1958, though not as sweeping in scope. The many judicial inconsistencies in such laws were also pointed out by the Supreme Court of Georgia which in recent years invalidated a similar statute. *Harris, v. Duncan*, 208 Ga. 561, 67 S.E. 2d 692 (1951).

C. ACT 193 OF 1958 UNLAWFULLY DELEGATES LEGISLATIVE POWER, INCLUDING THE POWER TO FIX PRICES, IN VIOLATION OF THE DUE PROCESS GUARANTEE OF THE FOURTEENTH AMENDMENT.

Act 193 of 1958 unlawfully delegates the following powers:

(1) Act 193 of 1958 delegates legislative authority to the Commissioner of Agriculture and Immigration, and

violates the requirements of due process by failing to provide adequate standards for his exercise of certain discretionary functions:

(a) Section 940.2(14) allows the Commissioner, in his uncontrolled discretion, to create, define and prohibit "Disruptive Trade Practices" other than those set forth by the legislature elsewhere in the Act. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1934). He can in effect define crimes, for violation of Act 193 is misdemeanor.

(b) Section 940.2(12) grants the Commissioner Legislative authority to determine "cost" (one of the most important determinations of the Act) by allowing him to determine what items must be considered as "costs of doing business". This delegation also allows the Commissioner effectively to define a crime since Section 940.5 and 940.7 prescribe criminal penalties for certain sales below "cost", as defined in Section 940.2(12).

(c) Section 940.11 is an unlawful delegation of legislative authority because it gives the Commissioner discretion to grant, withhold or revoke licenses. This delegation of authority to license or not to license is even more defective in the light of other invalid delegations to the Commissioner such as Sections 940.2(12) and (14). For example, the Commissioner may, using nothing but his own discretion, declare a customary trade practice to be "disruptive". If any merchant wishes to challenge such an edict he must face the immediate prospect of leaving the milk business because his license can be suspended peremptorily for violation of the Commissioner's ukase.

(2) Section 940.4 permits the Commissioner of Agriculture to fix a minimum price which shall not go into effect unless and until it is approved by two-thirds of the producers in a given market area (as defined by the Commissioner). This delegation is unlawful because (a) the producer controls whether any minimum price can be set and (b) can veto any changes even though the Commissioner may feel that drastically altered market conditions require adjustments in price. It is price fixing in the hands of private individuals under legislative fiat. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *Schecter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

D. ACT 193 OF 1958 IS UNCONSTITUTIONAL IN ITS ENTIRETY.

Although it is possible to conclude that a statute is constitutional only in part, the entire statute must nevertheless fall if its provisions are so interrelated that it cannot be presumed that the legislature would have enacted the provisions which do not violate the constitution independently of those which are found to be unconstitutional. *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938). Counsel submit that the invalid portions of Act 193 are so interrelated with the unchallenged portions that the entire enactment is invalid.

CONCLUSION.

Wherefore it is respectfully submitted that this court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code.

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Counsel for Plaintiff-Appellant.

CERTIFICATE.

I hereby certify that a copy of the Notice of Appeal and a copy of the foregoing Jurisdictional Statement have been served upon all opposing or interested counsel, by depositing copies in the United States mail, postage prepaid and properly addressed.

PAUL O. H. PIGMAN.

New Orleans, Louisiana
September 22, 1959

APPENDIX A.

No. 44,550.

SUPREME COURT OF LOUISIANA.

SCHWEGMANN BROTHERS GIANT SUPER MARKETS,

versus

SIDNEY J. McCRORY, COMMISSIONER OF AGRICULTURE & IMMIGRATION OF THE STATE OF LOUISIANA.

Appeal from the Nineteenth Judicial District Court
Parish of East Baton Rouge
Division "C"
Honorable Jess Johnson, Judge

FOURNET, Chief Justice.

The plaintiff, Schwegmann Brothers Giant Super Markets, a commercial partnership engaged in the business of selling, at retail, food and other commodities and conducting three very large establishments in New Orleans and its environs, sought an injunction in the Ninteenth Judicial District Court for the Parish of East Baton Rouge against the Commissioner of Agriculture & Immigration

of this State, Sidney J. McCrory, restraining enforcement of the provisions of Act 193 of the Legislature of 1958, known as the Orderly Milk Marketing Act, and attacking its constitutionality on various grounds. Certain producers and processors of milk and milk products, domiciled in various parts of the State, twenty-one in number,[1] were allowed to intervene and join with the defendant in defending the legality and constitutionality of the Act. After a full hearing[2] there was judgment decreeing that the rule nisi be recalled, vacated and set aside and plaintiff's suit be dismissed at its cost; and the plaintiff has appealed.

The said Act—a supplement and amendment to Part VII of Chapter 4 of Title 40 of the Revised Statutes and designated R.S. 40:940.1 to 940.15—according to its title,

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[1] These are: Blu-Ribon Dairies, Inc., Parish of Rapides; Claiborne Creameries, Inc., Parish of Claiborne; Nick FaKouri, d/b/a Clover Farm Creamery, Parish of St. Landry; Farmers Dairies, Inc., Parish of Lincoln; Walter Bison, d/b/a Fair View Farm Dairy, Parish of Caddo; John S. Green, d/b/a Green Brothers Dairy, Parish of Morehouse; Guth Dairies, Inc., Parish of Calcasieu; Charles Hamel, d/b/a Hamel's Dairy, Parish of Caddo; Briley Spears, d/b/a Leading Dairy, Parish of Calcasieu; Louisiana Creamery, Inc., Parish of East Baton Rouge; Glen O. Dunmire, Jr., d/b/a Lynn's Dairy Products, Parish of Caddo; J. B. Davis, d/b/a The Milk House, Parish of Franklin; John P. White, d/b/a Pelican Creamery, Parish of Iberia; D. Stafford O'Shee, d/b/a Quality Ice Cream Company, Parish of Rapides; Jesse H. Cutrer, Jr., d/b/a Red Bird Ice Cream Company, Parish of Washington; E. Leroy Miller, d/b/a Sanitary Dairy Products Company, Parish of Webster; S. J. Phillips, d/b/a Spring Valley Dairy, Parish of Caddo; William G. Broussard, d/b/a Vermilion Creamery, Parish of Vermilion; Watson's Ice Cream Factory, Inc., Parish of Calcasieu; C. A. Stewart, d/b/a C. A. Stewart Dairy, Parish of Washington; and Clyde DeLaughter, d/b/a Bogalusa Dairy Products, Parish of Washington.

[2] It was stipulated that the evidence offered on the application for a preliminary injunction should be considered by the Court as evidence on behalf of all parties on the application for permanent injunction without further trial.

is "* * * to protect and preserve the orderly marketing of milk, milk products and frozen desserts listed or referred to herein * * *,"[3] and contains a preamble declaring the Legislature's recognition of the development in the State of unfair competition and trade practices in the sale and distribution of those products, its further recognition of the necessity to protect and preserve orderly marketing and to prevent certain unfair trade and marketing practices, and expressing the lawmakers" intent to prevent the economic destruction of many dairy farmers and others dealing in said products because of discriminatory trade practices engaged in by certain financially strong business organizations to stifle competition—thus presenting "a situation detrimental to the health, welfare and economy of the people of this State." Among the practices engaged in by the plaintiff and other large chain stores, and sought to be abolished by provisions of the Act, were a system of rebates or discounts from invoice prices; trade concessions, including the furnishing of display and storage equipment, contributions for free use of refrigeration equipment, advertising paid for by those from whom the dairy products were bought, and trucking of the product from North Louisiana, the entire length of the

[3] The title further declares that the Act is one "to prevent disruptive trade practices; specifying the items covered by this act; defining the terms used therein; authorizing the establishment of minimum prices under certain conditions; providing regulations for the sale, transfer or other disposal of the products mentioned and for trade practices connected therewith; establishing license requirements; vesting in the Commissioner of the Louisiana Department of Agriculture and Immigration certain powers, duties and functions; providing penalties and establishing remedies for the violation of this Act; repealing all laws or parts of laws in conflict herewith."

State (by financially powerful distributors and processors not parties here) and offered for sale at prices cut in half and substantially below the market in the locality from which the product was shipped.

The first section of the Act lists the items covered by its provisions, i.e., the various kinds of milk, milk products and "frozen desserts" (40:940.1); the next section contains a definition of terms, including "Non-processing Retailer" which fits plaintiff's business, and "Cost" which "shall include the cost" of the product to the non-processing retailer plus cost of doing business—which latter shall include but not be limited to labor costs, including executive salaries, cost of receiving, cooling, processing, packaging, manufacturing, rent, depreciation, power, supplies, selling costs, delivery costs, storing, maintenance of plant and equipment, advertising, transportation, all types of licenses, taxes, fees, insurance, and all other costs of doing business as determined by the Commissioner; and cost shall be allocated proportionately to each unit of product sold "and in no case can any item or unit be sold for less than the unit cost; * * *."[4] (940.2.) By the following section (940.3), headed "Disruptive Sales Practices," it is declared to be a violation for a processor, handler, distributor or bulk milk handler[5] to do certain described

[4] There is a proviso that "in the absence of specific evidence that the cost of doing business as herein defined for a non-processing retailer is less than eight per cent, the cost of doing business * * shall be presumed to be not less than eight per cent of the invoice price and this cost shall be calculated to the nearest half cent per sales unit. * *" (940.2)

[5] The producer is the dairy farmer who obtains the raw milk from the cow and sells it to the processor, handler or distributor; the processor or handler (who may also in some cases

acts, including (a) "To discriminate in price between non-processing retailers or between consumers who purchase any of the products listed * * * where such products are offered for sale in the same size and type of container", (b) "To give or offer any discount or rebates on products sold * * *", (c) "To furnish, give, lend, sell or rent any signs and display material except those advertising only his own products," and the name or products of the non-processing retailer are not to be included in such signs or display material—except in the case of installations in place as of July 30, 1958.[6] The

be a distributor, or who may sell direct to the consumer) is the one who processes (i.e., cools, pasteurizes, homogenizes, flavors, etc.) the milk and packages it before it is delivered to the seller for sale to the public; a distributor is one who sells the products for purpose of resale or further processing; and a bulk milk handler is one who furnishes milk in cans, tank cars or tank trucks to the processor or handler. (Definition of terms, 940.2)

[6] The remaining violations enumerated in this subparagraph are: (d) "To make payments of money, credit, gifts or loans to non-processing retailers or their employees, or for rental for the storage or display of any of the products" covered by the Act; (e) "To sell any non-processing retailer any new fixture or equipment for less than a mark-up" as specified, and "any used equipment sold to a non-processing retailer by processor, handler, distributor, or bulk milk handler shall be sold" on the basis of price arrived at in a certain way; (f) "To make any loan" or guarantee or underwrite any financial obligation of a non-processing retailer; (g) to extend credit to a non-processing retailer to exceed 60 days; and delinquent accounts beyond 90 days subjects the non-processing retailer to revocation of his license; (h) to make or maintain repairs to the equipment of the non-processing retailer at less than usual charges; (i) to make a gift to him of money or merchandise, soda fountain, carbonator, services or material, or to help him conduct his business (except as permitted elsewhere); (j) to sell any product listed in the Act at "dock prices at places other than the point of processing," and if at the point of processing, the dock price shall be augmented by any transportation cost to place of distribution. The final violation is (k) refusal by a handler, processor or distributor to accept milk from a milk producer as a result of the latter's affiliation with a cooperative association. (940.3)

method is then provided (940.4) of arriving at minimum prices to producers so as to achieve orderly marketing, and is reproduced in full in the margin.[7]

Succeeding sections (940.5 and 940.6), prohibiting certain acts by processors, handlers and or distributors, need not be detailed. With reference to sales by a non-processing retailer, the Act provides (940.7). "No non-processing retailer shall with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, advertise, give, offer to sell or sell within the state of Louisiana, any of the items listed or referred to * * * for less than cost as defined in R.S. 40:940.2. Proof of the advertising, giving, offer to sell or sale of such products by a non-processing retailer for less than cost to such non-processing retailer shall be prima facie evidence of a violation of this Section." Like

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[7] "Upon written request of 50 per cent or more of the dairy farmers who regularly supply milk to a milk marketing area, the commissioner shall determine, by official order, after public hearing in which all interested persons shall be given reasonable opportunity to be heard, the appropriate area to be included in the marketing area and minimum prices to be paid for milk by processors or handlers, distributors or bulk milk handlers for milk received. Such minimum prices in any milk marketing area within the state shall be beneficial to the public interest, protect the dairy industry of the state, and insure a sufficient quantity of pure and wholesome milk for inhabitants of this state. In determining the minimum prices, the commissioner shall take into consideration the following factors operative in each marketing area; the quantity of fluid milk produced and disposed of; the cost of dairy feed, farm labor, and other economic conditions affecting the production and sale of milk in the area. The commissioner shall, upon approval by 2/3 of the producers voting at a referendum in the marketing area, require payment of such appropriate minimum prices for milk in the respective marketing areas."

provisions are applicable to sales by bulk milk handlers (940.8), followed by prohibition (940.9) of combination sales involving milk products with any other commodity or service at a price less than the aggregate of the prices for each, with intent or effect of injuring a competitor, destroying competition or creating a monopoly.* Rebates, discounts, and other trade practices by processors, handlers or distributors with intent to destroy competition are prohibited (940.10) except upon final liquidation of business, items sold under court order, where the prices of similar or comparable products are made in good faith to meet legal competition, or bids are made in response to invitation from governing bodies. Non-processing retailers as well as other named handlers of milk are required (940.11) to be licensed by the Commissioner; the method for obtaining the license and provision for revocation are incorporated in this Section. The Commissioner, designated "the instrumentality of the state" for administering the Act and "to execute the legislative intent herein expressed" (940.12), is vested with certain powers deemed appropriate and necessary to that end, including subpoena power; he promulgates regulations pertaining to the purchases and sales of the affected products, and is empowered to issue licenses for the sum of one dollar annually. He is further authorized to assess against those who process or handle any of the products listed, certain fees to cover the cost of administering the pro-

* By further provision of the subsection, "Proof of the advertising, giving, offering to sell of sale of such product with any other commodity or service at a combined price which is less than the aggregate of the price for which such product and the other commodity or service are offered for sale shall be prima facie evidence of a violation of this Section." (940.9)

visions of the Act (940.13), the said fees and other monies to be deposited in the state treasury to the credit of a revolving fund, the assessments to be adjusted so that the fund does not exceed a stated amount (940.14). Penalties for violation of the Act are set out in the final paragraph (940.15).

The market practices which led to this enactment are disclosed by the record, wherein is revealed a system developed by plaintiff under which it received rebates or discounts from the invoice prices[9] in addition to trade concessions, such as contributions for its free use of refrigeration, display and storage equipment, and advertising furnished and paid for by those from whom it bought dairy products. There was also the practice by large distributors and processors of trucking merchandise great distances from one end of the State to the other, and selling it to big chain stores at prices cut in half below the current market in that locality. In the words of the Trial Judge, "It does not take much imagination to realize the result of such practices on the small dairies and processors who could make some money at a fair current market price with fair competition, but who were not financially strong enough to meet such abnormal competition." But the effect of such practices is denied by the plaintiff, who asserts that official statistics of the U.S. Department of Agriculture[10] covering the period from 1945 to 1957 reflect an

[9] One of the plaintiff-owners in this case testified that plaintiff first deducted 5% of the invoice price of milk and milk products, then added a cost mark-up of 6% of the remainder.

[10] The publications introduced as exhibits by plaintiff are: *Dairy Statistics*, U.S. Dept. of Agriculture (Oct. 1957); *Milk-Farm Production, Disposition, and Income*, 1956-1957, U.S. Dept. of Agriculture; *The Farm Income Situation*, U.S. Dept. of Agriculture (Sept. 1958).

expanding and prosperous dairy industry is Louisiana, showing an increase in quantity, price and cash receipts significantly larger than that of neighboring states and three times the national average; and counsel assert that "What the witnesses [intervenors and other witnesses for defendant] were unknowingly describing was competition in a free economy."

In giving his carefully prepared Reasons the Trial Judge observed: "The evidence in this case, some of which has been referred to briefly herein, convincingly sustains the already well known fact that the all-power combination of volume buying and adequate financial resources has developed demands and requirements which the small producer, processor and retailer cannot meet. Nor is it shown that the effect of such a combination has profited the consumer." One brief reference was to an ice cream processor of Lake Charles who, said the Trial Judge, "explained that his company had been in business for 44 years and that it had made a profit every year except in the last 5 years his business lost money 3 out of the 5 years, and that one more year with the necessary outlay to meet the discount, rebate, trade concessions and contributions required to hold customers would have put his company out of business. This manner of testimony was repeated by all the witnesses for the defense. It is further shown that the short period of a few months after August 1, 1958, when Act 193 went into effect, has brought equal and wholesome relief from this disruptive pressure which brought about its enactment. There is no testimony that the discontinuance of these prac-

tices * * * has resulted in any material general increase in the retail price to the consumer."[11]

[11] Other testimony to the same effect was (a) By a processor and small distributor in Webster and Claiborne Parishes, who got caught in a "milk war" between two major concerns in Monroe and Shreveport, with the result that milk in super markets in his locality dropped from 52 cents to 39 cents a half gallon—yet the price where the milk was processed, bottled and put up for wholesale distribution by one of those major concerns was 49 cents a half gallon and it then had to be hauled 100 miles to a dock plus 30 miles from there to the witness' area; (b) By a man in the milk business for some 30 years in the Alexandria area, who described the same situation when a big distributor, which bottled and processed the milk 130 miles away, started selling to chain stores below cost; (c) By an ice cream manufacturer of Claiborne Parish who lost accounts because he had to refuse to give discounts and rebates and to furnish free a refrigerated cabinet for storage and display of non-dairy foods such as frozen foods, meats, etc.; and who also lost accounts to a "big chain" which quoted a price of 50 cents per half gallon for ice cream when the list price was 80 cents; (d) By a dairyman in Lake Charles, who at one time had employed 38 people but because of the loss of approximately one-third of the volume of his business due to the tactics being used in the milk industry had found it necessary to reduce his force considerably—his loss of business having been caused in large part because milk imported from Shreveport was selling in Lake Charles for 39¢—the while the same quantity and quality were being sold in Shreveport for 45¢; (e) By a retail grocer, who stated that the volume of his business on all items fell off because he was having to buy milk at a higher price than the selling price of his competitors, made possible because they were getting discounts and he was not; and (f) By a disinterested witness, with wide knowledge and experience in the field of marketing and utilization of milk and milk products, who testified concerning the practice of big chains of selling at a loss in a particular area but maintaining the prices in another area to make up the losses. This witness, who, under authority of the U.S. Secretary of Agriculture, had prepared the Federal orders under which milk was being sold in the Shreveport area, stated that the procedure for determining a fair minimum price under the Louisiana statute was identical to that under the Federal Act except for the jurisdiction. With reference to the "loss leader" sales of milk, he aptly observed: "Therefore, I think it could be concluded properly that the Shreveport housewife was subsidizing the Lake Charles housewife to some extent."

The plaintiff's first and most seriously urged contention is that the Act unlawfully delegates legislative power, including the power to fix prices, in violation of State and Federal due process guarantees. The unlawful delegations are said to be found (a) in Section 940.4, which permits the Commissioner of Agriculture to fix a minimum price, to go into effect only if approved by two-thirds of the producers in a given marketing area (as defined by the Commissioner)—thus effecting an unlawful delegation to private persons of legislative authority to fix minimum prices, because the producer controls whether any minimum price will be fixed and can effectively control, through use of the veto power, any change in a price once set; (b) in Section 940.1, in that the State Board of Health is given authority to define one of the major product groups regulated by the Act,[12] without providing any sort of standard; thus the State Board of Health can control the scope of the Act and "legislate" by extending or narrowing its definition of frozen desserts at will; (c) in a failure to provide adequate standards for exercise by the Commis-

[12] Section 940.1, after listing the various kinds of milk and milk products covered by the Act, provides: "Also, all frozen desserts as defined in Section 1 of Chapter XXV of the Sanitary Code of the State of Louisiana as revised through February 22, 1957, including any subsequent revisions." The said Section 1 defines a frozen dessert as "any sound and clean, frozen or partially frozen combination of two or more of the following: Milk or milk products, vegetable fat, animal fat, other food products approved by the Louisiana State Board of Health, eggs or egg products, nutritive sweetening ingredients, artificial sweetening ingredients (used only in diabetic desserts), water, confection (defined in Section 5), nut meats, fruit or fruit juices, citric or other organic food acid or other wholesome flavoring agents and colors together with harmless stabilizer, and shall be deemed to include ice cream, fruit ice cream, nut ice cream, ice milk, frozen malt ice cream, french ice cream, milk sherbet, ices or water ices, mellorine, olarine, sherine, and icicle bars."

sioner of certain discretionary functions, in violation of the requirements of due process; e.g., by Section 940.2 (14), the Commissioner is allowed to create and define "Disruptive Sales Practices" other than those set forth elsewhere in the Act;[13] by Section 940.11 he is given discretion to grant, withhold or revoke licenses; by Section 940.2(12) he has authority to determine "cost" by determining what items must be considered as "costs of doing business,"[14] and ultimately to define a crime, since other sections (940.5, "Sales by a processor, handler or distributor" and 940.7, "Sales by a non-processing retailer") declare certain sales below "cost" as defined in the Act to be a violation of its provisions, with attendant criminal penalties. The authorities relied on in the main are Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 60 L.Ed. 1160; City of Alexandria v. Alexandria Fire Fighters Ass'n, 220 La. 754, 57 So.2d 673; Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. G. S. Mkts., 231 La. 51, 90 So.2d 343, 60 A.L.R.2d 410; State v. Maitrejean, 193 La. 824, 192 So. 361, and State v. Chisesi, 187 La. 675, 175 So. 453.

Defendant and intervenors counter with a denial that private individuals fix minimum prices, contending that Section 940.4 sets out factors for the Commissioner to take into consideration in determining the minimum prices in each marketing area, and in that way stand-

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[13] That paragraph provides "disruptive Sales Practices" means those practices which are prohibited in R.S. 40:940.3 or such other practices as may be determined by the commissioner to be disruptive of orderly marketing. (R.S. 40:940.2(14))

[14] The term "cost", defined in 940.2(12), is composed of the various factors there listed, "and all other costs of doing business as determined by the commissioner." For a more complete quotation see the third paragraph of this opinion.

ards are prescribed for carrying out the legislative will; that private individuals at a referendum and upon approval of two-thirds of the milk producers voting, merely approve such minimum prices—following which the Commissioner shall require payment of such minimum prices, and therefore no arbitrary discretion is vested in him. Relied on are the cases of Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441, and U.S. v. Rock Royal Cooperative, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446.

Due to the complexity of our social and industrial activities, the decisions display an increasing tendency to hold as non-legislative the authority conferred upon commissions and boards to determine the facts or state of things upon which the law intends to make its action depend. It is now well settled that the Legislature may make the operation or application of a statute contingent upon the existence of certain conditions, and may delegate to some executive or administrative board the power to determine the existence of such facts and to carry out the terms of the statute.[15] So long as the regulation or action of the official or board authorized by statute does not in effect determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within prescribed limits some fact upon which the law by its own terms operates, such regulation is administrative and not legislative in its nature.[16] The United

[15] For a further statement of these principles, and pertinent authorities, see City of Alexandria v. Alexandria Fire Fighters Ass'n, 220 La. 754, 57 So.2d 673.

[16] See Annotation, Delegation of Legislative Power, 79 L.Ed. 479, 481 et seq.

States Supreme Court has aptly observed that while powers of administration and legislation are quite distinct, "the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and particularize they would miss sufficiency both in provision and execution. * * * If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility, and government in some of its most important exercises become impossible."[17]

The case of Currin v. Wallace, supra (83 L.Ed. 441), has important points of similarity to the instant case: the Secretary of Agriculture, authorized by Congress to investigate the handling, inspection and marketing of tobacco and to establish standards by which type and grade might be determined, was empowered to designate the markets in which tobacco was to be bought and sold if two-thirds of the growers, voting at a special referendum, favored it, and that provision was attacked as an unconstitutional delegation of legislative power to individuals; but the Court declared that the required referendum was merely a condition under which the

[17] Mutual Film Corp. v. Industrial Commission, 236 U.S. 230, 59 L.Ed. 552, 35 S.Ct. 387, Ann. Cas. 1916C, 296.

Secretary was to be bound in the exercise of his administrative powers under the Act. "The intention of Congress is clear that markets thus ascertained shall be designated subject to the prescribed conditions and as rapidly as facilities for inspection are available. We find no unfettered discretion lodged with the administrative officer. The requirement of a referendum, as already noted, calls for the expression of the wishes of the growers and the Secretary acts merely as an administrative agent in conducting the referendum." (83 L.Ed. at page 452.)

The case of United States v. Rock Royal Cooperative, supra (307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446), is very much in point, treating as it does of an order of the Secretary of Agriculture regulating the handling of milk in the New York metropolitan area, which order had provisions similar to our Orderly Milk Marketing Act. There, a section of the Agriculture Marketing Agreement Act of 1937, 7 U.S.C.A. § 601 et seq., under which the Secretary of Agriculture fixed a fluctuating minimum price based on wholesale butter prices in New York, was attacked as an invalid delegation of power.[18] In rejecting the attack, the Supreme

[18] That suit was instituted by the United States for a mandatory injunction requiring the defendant milk cooperatives and milk handlers to comply with Order No. 27 of the Secretary of Agriculture regulating the handling of milk in the New York Metropolitan area, and also, if it should be found that defendants were not subject to that Order, then alleging violation of Official Order No. 126 issued by the Commissioner of Agriculture and Markets of the State of New York. The two orders were in pari materia, one covering milk moving in interstate commerce, and the other covering milk in intrastate commerce. The Commissioner of Agriculture and Markets of the State of New York was permitted to intervene as party plaintiff, and sought

Court of the United States said: "While it is true that the determination of price under this section has a less definite standard than the parity tests of Section 2 and 8e, we cannot say that it is beyond the power of the Congress to leave this determination to a designated administrator, with the standards named. The Secretary must have first determined the prices in accordance with Section 2 and Section 8e, that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price

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an injunction commanding the defendants to comply with his Order No. 126 or, if it did not apply, then to comply with the Order of the U.S. Secretary of Agriculture. The answers challenged the two orders as contrary to the Fifth and Fourteenth Amendments to the Constitution, and challenged the Act of Congress as involving improper delegation of legislative power. It appears that in the final analysis the controversy revolved almost entirely around Order No. 27, backed by the Statute under which it was issued, a provision of which authorized the Secretary, if he finds after a hearing that minimum prices with a base period purchasing power are unreasonable, to fix minimum prices so as to reflect the prices of available supplies of feed and other economic conditions; it also provided for use of volvntary agreements as to certain specified commodities, including milk, and for orders instead of agreements when the Secretary of Agriculture had reason to believe that issuance of an order would tend to effectuate the declared policy of the Act, and after notice and an opportunity for hearing; in such Order the Secretary was required to set forth a finding upon the evidence introduced at the hearing, and that the issuance of the Order and the terms and conditions thereof would tend to effectuate the declared policy (Section 1 declares that the disruption of orderly exchange of commodities impairs the purchasing power of farmers, thus destroying the value of agricultural assets to the detriment of the national public interest). Orders may only be issued after hearing upon a marketing agreement which regulates the handling of the commodity, and do not become effective unless approved by a majority of the handlers—but notwithstanding the refusal or failure of handlers to sign a marketing agreement relating to the commodity the Secretary of Agriculture, with approval of the President, may issue an order if he determines that the refusal or failure of the handlers

so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary." (83 L.Ed. at 1472.) The Court observed that milk belongs to that category of commodities that for many years has been subjected to the regulatory power of the State, and with reference to an attack on another pertinent provision of the same Act, disposed of the matter in those words: "By subsection 19 it is provided that for the purpose of ascertaining whether the issuance of

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to sign such agreement tends to prevent the effectuation of the declared policy with respect to the commodity and that the issuance of the order is the only practical means of advancing the interest of the producers. In such a case the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during the period, in the production for market of the commodity within the area, or by two-thirds of those engaged in the production of the commodity for sale in the marketing area. A referendum is authorized to determine whether the issuance of the order is approved by the producers.

Among pertinent observations made by the Court in the course of a lengthy examination of the Act, including phases with which we are not here concerned, is one distinguishing the case of Schechter Poultry Corp. v. United States, 295 U.S. 538, 79 L.Ed. 1584, 55 S.Ct. 837, 97 A.L.R. 947, cited by the plaintiff here as "probably the leading case on the subject of the constitutional delegation of legislative power," as follows: "Unlike the language of the National Industrial Recovery Act condemned in the A.L.A. Schechter Poultry Corp. Case, the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices * *. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out * *. While considerable flexibility is provided * *, it gives opportunity only to include provisions auxiliary to those definitely specified."

such an order is approved 'the Secretary may conduct a referendum among producers.' The objection is made that this is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation." (citing Currin v. Wallace, supra) (83 L.Ed. at 1472.)

Plaintiff's counsel have been diligent in envisaging situations which they consider possible and view with alarm, but we think such fears are unwarranted at this time in the absence of a shred of showing that such happenings, contrary to the intent and purpose of the enactment, might occur. An Act of the Legislature is presumed to be legal until it is shown to be unconstitutional, and the lawmakers would indeed be hard put to draft legislation were it necessary to cover every conceivable contingency or to foresee and prohibit acts of an irresponsible administrator. The purpose and intent of the subject statute is clearly expressed, and the Commissioner of Agriculture, specifically declared to be the instrumentality of the State for the purpose of administering its provisions, is given the duty "to execute the legislative intent herein expressed." The Supreme Court of the United States, speaking in the Rock Royal case, said: "* * * It is well settled therefore that it is no argument against the constitutionality of an Act to say it delegates broad powers to executives to

determine the details of any legislative scheme. This necessary authority has never been denied." We therefore think that the objections raised by plaintiff on the ground that the Act unlawfully delegates legislative power in certain of its provisions are without merit. The authorities cited in support are distinguishable for various reasons, and in view of our further conclusions set out below are not controlling here.

The plaintiff next contends that the Act violates the due process clauses of the State and Federal Constitutions because the power to regulate private business by coercive price fixing is a legislative function, to be invoked under special circumstances and only when the measure bears a real, substantial and reasonable relation to the public welfare, and is neither arbitrary nor discriminatory—a criterion which the Act fails to meet.

The trial judge, in disposing of this issue, relied in great measure on the case of Louisiana Wholesale Distributors Ass'n v. Rosenzweig, 214 La. 1, 36 So.2d 483, observing that the "Unfair Sales Law," R.S. 51:421 et seq., under attack there, is a comparable example of constitutional regulatory legislation, and that he deemed the decision controlling. In this we think he was eminently correct.

"In that case the defendant Rosenzweig, as a defense to the charge that he had violated the Unfair Sales Act, contended that such a statute is, in fact, a price fixing statute and class legislation, precluding him from freely contracting with regard to his property, in violation of

due process and equal protection guarantees of the Federal and state Constitutions. This Court, observing that the simple question posed (i.e., constitutionality vel non of the Unfair Sales Act) had been answered adversely to the defendant's contention by the courts of thirty states which had reviewed the similar acts adopted by their respective legislatures, and that the underlying principle upon which these decisions are based has the support of opinions of the Supreme Court of the United States, quoted at length from "the leading case on this subject, Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 595, 78 L.Ed. 940, 89 A.L.R. 1469," which posed the question of the constitutionality of a New York milk control law adopted for the purpose of thwarting harmful competition,[19] and contained many pertinent observations that were equally applicable in the case then under consideration. Among these were that. "'So far as the requirement of due process is concerned, * * a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied and judicial determination to that effect renders a court

[19] The defendant complained that the Board's order fixing minimum prices discriminated unfairly against him as a "cash and carry" dealer in milk since his rivals in the trade who had no store but only a wagon and delivery route were allowed to sell pints of milk as low as he did, with delivery to the customer's door as a bonus.

functus officio. * * * And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. * * * Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity * * * The constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.'" (214 La. at 10 et seq., quoting from 78 L.Ed. at 957 et seq.) We then said: "Such acts have consistently been held not to be price fixing statutes. They merely fix the level below which producers and distributors may not sell without injury to a competitor and ultimately, to the community." Our conclusion was that "in adopting this state's Unfair Sales Act for the protection of our economic structure and to prevent the creation or perpetuation of monopolies, the legislature was acting well within its police power." (214 La. at 14.).

Plaintiff's counsel, realizing that their argument on this phase of the case is foreclosed by the above decisions, advance the thesis that principles announced in the Nebbia case are applicable only where emergency legislation has grown out of a legislative study—be-

cause the New York milk control law, adopted in 1933, was the result of study by a joint legislative committee whose activities extended for nearly a year, following which a comprehensive report was submitted; and counsel say that in the absence of such emergency and study there is lacking any basis which the Nebbia case might otherwise furnish for the regulation of milk marketing and distribution under the subject Act. Those statements are without substance, particularly in view of the principle for which the Nebbia case was subsequently cited by the same Court, when it said: "Recently, upon a re-examination of the grounds of state power over prices, that power was phrased by this Court to mean that 'upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.'"[20] Equally unimpressive is the assertion that the Rosenzweig case is not controlling because we there concluded the Unfair Sales Act was *not* a price fixing statute, whereas the Act under attack is a price fixing statute—and differences between provisions of the two Acts, termed "significant" and "critical," are enumerated in brief. Suffice to say that the distinctions made are not of controlling importance, and additional discussion would serve no useful purpose.

It is further objected by plaintiff that the Act creates a presumption of guilt (ignoring the presumption of innocence fundamental under our law) in violation of due process guarantees of both Federal and State Con-

[20] United States v. Rock Royal Cooperative, 207 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1466, 1468, citing Nebbia v. New York, 291 U.S. 502, 537, 78 L.Ed. 940, 957, 54 S.Ct. 505, 89 A.L.R. 1469.

stitutions, that a series of new crimes has been created by Sections 940.5 through 940.10, in that the doing of any one of a number of otherwise harmless acts with the intent or the effect of injuring a competitor, destroying competition, creating a monopoly, etc., is a crime, and while the intent or effect are necessary before the act becomes criminal, those elements are supplied by making the commission of the act prima facie evidence of violation of the section—the fatal defect being the presumption of the wrongful intent or injurious effect which are essential elements of the crime.

Reference to the wording of the various provisions complained of readily shows that counsel's analysis is not wholly accurate; they declare that none of the groups or individuals (as therein defined) who handle the products covered by the Act, "with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly," shall do a described thing; and *proof of the doing of the thing* "shall be prima facie evidence of a violation of this Section." Penalties for such violation are set out in 940.15, and that section makes clear that punishment is by Court action—the subsection declares that "violation of this sub-part shall be a misdemeanor, punishable by fine not to exceed $500 in the discretion of the court," and refers to injunctions at the suit of any person aggrieved as well as to suits against the violator in the courts of competent jurisdiction.

In State v. Elkin, 177 La. 427, 148 So. 668, this Court had for consideration the constitutionality of a statute (Act 209 of 1914) declaring that failure to pay a worthless check within ten days after written notice to the drawer of its non-payment "shall be prima facie evidence of intent to defraud, within the meaning of this act," and held that the provision did not strip the accused of a presumption of innocence without due process of law, observing "In other words, under [Section 1] the statute, the guilty knowledge of the drawer that his check is worthless when issued constitutes fraudulent intent upon his part. The Legislature has declared that failure to pay the check, within ten days * * shall be prima facie evidence of such guilty knowledge of fraudulent intent. There is nothing unreasonable or arbitrary in this clause of the statute, * * The presumptive clause bears directly upon the guilty knowledge of the accused, and provides a rational relation between the fact proved and that presumed." Also, "An accused person in this state is permitted to testify in his own behalf, and his testimony is weighed according to the rules of evidence applicable to other witnesses. The presumption of intent to defraud under the statute is prima facie and rebuttable and, therefore, does not deprive an accused of the opportunity to submit all the facts bearing upon the issue." (177 La. at 432.) And in Yee Hum v. United States, 262 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904, the Court said: "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the addi-

tional weight of a countervailing legislative presumption." The following, from an earlier pronouncement of the Court, was quoted approvingly: "'Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is left to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding than are numerous. * * * That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.'" (69 L.Ed. at 906.)

While counsel oppose on numerous other grounds—i.e., that the Act is arbitrary, unreasonable and capricious, is so vague, general and indefinite in numerous instances as to be impossible of reasonable, fair and practical administration, etc.—we think that enough has been said to show that these objections are clearly without merit. And the argument that the statute creates undue burdens on interstate commerce and contravenes the commerce clause of the Federal Constitution is fully answered by the United States Supreme Court when, in treating of a Pennsylvania statute creat-

ing a milk control board with authority to fix a minimum price to be paid producers (e.g. farmers), where a milk receiving plant within the state which purchased the commodity for shipment out of the state sought to justify its failure to comply with the statute's requirements by claiming that it was engaged in interstate commerce, the Court said:[21] "* * * One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation. * * * The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is per-

[21] Milk Control Board of the Commonwealth of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752, at 756.

missible until superseded by Congressional enactment. * * *".

For the reasons assigned, the judgment appealed from is affirmed.

SIMON J., Recused.

APPENDIX B.

Act 193 of 1958

ORDERLY MILK MARKETING ACT.

To supplement and amend Part VII of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950 by adding thereto a new sub-part to be designated as Sub-Part D adopting an orderly milk marketing act to protect and preserve the orderly marketing of milk, milk products and frozen desserts listed or referred to herein; to prevent disruptive trade practices; specifying the items covered by this act; defining the terms used therein; authorizing the establishment of minimum prices under certain conditions; providing regulations for the sale, transfer or other disposal of the products mentioned and for trade practices connected therewith; establishing license requirements; vesting in the Commissioner of the Louisiana Department of Agriculture and Immigration certain powers, duties and functions; providing penalties and establishing remedies for the violation of this Act; repealing all laws or parts of laws in conflict herewith.

WHEREAS the Legislature of Louisiana recognizes that the commission of certain acts, hereinafter declared unlawful, tends to cause disruptive practices in the orderly marketing of milk, milk products and frozen desserts as listed or referred to herein; and that unfair competition and trade practices have developed in the State in the sale and distribution of such products, and

WHEREAS it is necessary to protect and preserve the orderly marketing of these products in order to assure a full supply of fresh wholesome milk, including fluid milk, milk products and frozen desserts as listed or referred to herein; and to eliminate and to prevent unfair competition and trade and marketing practices found to be contrary to the general welfare of the people of this State, and

WHEREAS it is the intent of the Legislature to prevent the economic destruction of many dairy farmers, dairy plants, ice cream dealers and resale merchants as a result of discriminatory trade practices by certain business organizations financially strong enough to sell below their own costs for an extended period of time, which presents a situation detrimental to the health, welfare and economy of the people of this State.

Be it enacted by the Legislature of Louisiana:

Section 1: That Part VII of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950 is supplemented and amended by adding thereto a new sub-part to be designated as:

Sub-Part D. Orderly Milk Marketing same to be composed of Sections 940.1 to 940.15, reading as follows:

Section 940.1 Items Covered by this Act. All grade A raw milk for pasteurization, regular, standardized, whole pasteurized milk, special milk, Vitamin D and/or homogenized milk, plain or creamed buttermilk, cottage

cheese, creole cream cheese, flavored milk, flavored milk drink, skim milk, fluid cream, concentrated milk, and any mixture of skim milk and butterfat. Also, all frozen desserts as defined in Section 1 of Chapter XXV of the Sanitary Code of the State of Louisiana as revised through February 22, 1957, including any subsequent revisions.

Section 940.2 Definition of Terms.

(a) COMMISSIONER: "Commissioner" means the Commissioner of the Louisiana Department of Agriculture and Immigration.

(b) DEPARTMENT: "Department" means the Louisiana Department of Agriculture and Immigration.

(c) AGENT: "Agent" means a representative of the Commissioner and/or the Department.

(d) PERSON: "Person" means any individual, partnership, corporation, cooperative association, or any other business unit.

(e) MILK PRODUCER: "Milk Producer" means any person who owns or controls one or more cows and a part or all of the milk is sold regularly to a handler, processor or bulk milk handler as milk for human consumption in conformity with health regulations.

(f) COOPERATIVE ASSOCIATION: "Cooperative Association" means any cooperative association which the

Commissioner determines after application by the association:

(1) To qualify under the provisions of R.S. 1950, Title 3, Chapter 2, Part II, Sections 121 through 149.

(2) To have full authority in the sale of milk of its members and to be engaged in making collective sales or marketing milk, milk products and frozen desserts as herein defined for its members.

(g) PROCESSOR OR HANDLER: "Processor or Handler" means any person engaged in the business of processing and/or packaging bulk milk and/or other materials into any of the products listed or referred to in Section 940.1. If a cooperative association distributes or makes available on consignment or otherwise any of the products in Section 940.1 within the state to stores or consumers, it shall be deemed to be a milk processor or handler as to that part of its business, and shall be governed by the provisions of this Act applicable thereto. This definition shall also include all ice cream manufacturers as well as those processors or operators of frozen dessert machines.

(h) DISTRIBUTOR: "Distributor" means any person, other than a bulk milk handler as hereinafter described with respect to transfer of title to bulk milk, engaged in the business of transferring title within the state to the products listed or referred to in Section 940.1 for a consideration, where such property is to be sold for the purpose of resale or further processing,

or is to be used or consumed by the purchaser and not resold or used for the purpose of further processing.

(i) NON-PROCESSING RETAILER "Non-Processing Retailer" means a person, engaged in the business of transferring title within the State to products listed or referred to in Section 940.1 for a consideration where such products are to be used or consumed by the purchaser and are not to be resold or used for the purpose of manufacture or further processing.

(j) BULK MILK: "Bulk Milk" means milk in bulk form, in cans, tank cars or tank trucks that is furnished to a processor or handler for the purpose of processing and manufacture into the products listed or referred to in Section 940.1.

(k) BULK MILK HANDLER: "Bulk Milk Handler" means any person engaged in the business of transferring title of bulk milk to a processor or handler.

(l) COST: The term "cost to each processor, handler, distributor, bulk milk handler, or non-processing retailer", hereinafter referred to as "cost", shall include the cost of milk, or milk products and frozen dessert, as listed or referred to in Section 940.1 of this Act, plus the cost of doing business by each processor, handler, distributor, bulk milk handler, or non processing retailer, which costs of doing business shall include but not be limited to, labor costs (including salaries of executives and officers), cost of receiving, cooling, processing, packaging, manufacturing, rent, de-

preciation, power, supplies, selling costs, delivery costs, storing, maintenance of plant and equipment, advertising, transportation, all types of licenses, taxes, fees, insurance, and all other costs of doing business as determined by the Commissioner. Cost shall be allocated proportionately to each unit of product sold and in no case can any item or unit be sold for less than the unit cost; provided that in the absence of specific evidence that the cost of doing business as herein defined for a non-processing retailer is less than eight per cent, the cost of doing business by such non-processing retailer shall be presumed to be not less than eight per cent of the invoice price and this cost shall be calculated to the nearest half cent per sales unit. In the case of the non-processing retailer in the absence of evidence of costs, the eight per cent or cost herein provided shall apply to each unit of sale at the time and place of sale.

(m) LICENSEE: "Licensee" means a cooperative association, processor or handler, distributor, bulk milk handler, or non-processing retailer, as defined in Section 940.2 (f), 940.2 (g), 940.2 (h), 940.2(i), and 940.2 (k) above, licensed in accordance with the provisions of this Act.

(n) DISRUPTIVE SALES PRACTICES: "Disruptive Sales Practices" means those practices which are prohibited in Section 940.3 of this Act or such other practices as may be determined by the Commissioner to be disruptive of orderly marketing.

Section 940.3 Disruptive Sales Practices. It shall be a violation of this Act for a processor, handler, distributor, or bulk milk handler to do any of the following acts:

(a) To discriminate in price between non-processing retailers or between consumers who purchase any of the products listed or referred to in Section 940.1 where such products are offered for sale in the same size and type of container.

(b) To give or offer any discount or rebates on products sold, as listed or referred to in Section 940.1.

(c) To furnish, give, lend, sell or rent any signs and display material except those advertising only his own products. Such signs and display material shall not contain the name or products of such non-processing retailer. All signs installed and or rental agreements on advertisements in place as of the effective date of this Act shall be considered in compliance with this regulation, provided that such signs or installations shall not be moved to a new or different location for the purpose of advertising the name or products of such non-processing retailer.

(d) To make payments of money, credit, gifts or loans to non-processing retailers or their employees or for rental for the storage or display of any of the products listed or referred to in Section 940.1.

(e) To sell any non-processing retailer any new fixture or equipment for less than a mark-up to cover

his cost of doing business which shall be deemed in the absence of specific proof to be ten per cent. Any used equipment sold to a non-processing retailer by processor, handler, distributor, or bulk milk handler shall be sold on the basis of the manufacturer's cost, less depreciation, plus a mark-up to cover the processor's, handler's, distributor's or bulk milk handler's cost of doing business which shall be deemed in the absence of specific proof to be ten per cent of their depreciated book value; provided that in no case shall used equipment be transferred to a non-processing retailer at less than a reasonable value of the equipment at the time of sale and in no case shall such transfer be at less than 25 per cent of the original purchase price of such equipment. Provided further that any equipment furnished to a non-processing retailer by a processor, handler, distributor, or bulk milk handler for the storage and display of such processor's, handler's, distributor's or bulk milk handler's products, (except as herein provided) shall be considered in violation of the provisions of this Act unless compliance is achieved within six months after the effective date of this Act.

(f) To make any loan, to guarantee or to procure another to guarantee or to underwrite any financial obligation of a non-processing retailer.

(g) To extend credit to a non-processing retailer to exceed 60 days. Delinquent accounts beyond 90 days shall subject such non-processing retailer to a revocation of his license.

(h) To maintain or make repairs of any equipment owned by a non-processing retailer, at less than charges comparable to competitive commercial fees including service and parts.

(i) To make any gift of money, merchandise, soda fountain, carbonator, services or material of any value to any non-processing retailer, to assist him in the conduct of his business, except as provided pursuant to Section 940.10 of this Act.

(j) To give, offer or sell any product listed or referred to in Section 940.1 at dock prices at places other than the point of processing, except that such dock price shall be the dock price at the point of processing plus any transportation cost to such other place of distribution.

(k) For any handler, processor and or distributor to refuse to accept or to discontinue to receive milk from a milk producer as a result of such producer's affiliation with a Cooperative Association or as a result of activities engaged in by such Cooperative Association or efforts to organize a producer association; Provided this provision shall not apply to milk which is not produced in compliance with sanitary requirements of the Louisiana State Board of Health.

Section 940.4 Minimum Prices to Producers to Achieve Orderly Marketing. Upon written request of 50 per cent or more of the dairy farmers who regularly supply milk to a milk marketing area the Commissioner

shall determine, by official order, after public hearing in which all interested persons shall be given reasonable opportunity to be heard, the appropriate area to be included in the marketing area and *minimum prices* to be paid for milk by processors or handlers, distributors or bulk milk handlers for milk received. Such minimum prices in any milk marketing area within the State shall be beneficial to the public interest, protect the dairy industry of the State, and insure a sufficient quantity of pure and wholesome milk for inhabitants of this State. In determining the minimum prices, the Commissioner shall take into consideration the following factors operative in each marketing area: the quantity of fluid milk produced and disposed of, the cost of dairy feed, farm labor, and other economic conditions affecting the production and sale of milk in the area. The Commissioner shall, upon approval by 2/3 of the producers voting at a referendum in the marketing area, require payment of such appropriate minimum prices for milk in the respective marketing areas.

Section 940.5 Sales by a Processor, Handler and/or Distributor. No processor, handler and or distributor shall, with the intent or with the effect of unfairly diverting trade from a competitor or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, advertise, give, offer to sell or sell within the State of Louisiana, at wholesale or retail, any product listed or referred to in Section 940.1 for less than cost of the processor, handler and/or distributor as defined in sub-part (1) of Section 940.2 of this Act. Proof of the advertising, giving, offer to sell

or sale of such products by a processor, handler, and or distributor for less than cost to such processor, handler, and or distributor shall be prima facie evidence of a violation of this paragraph.

Section 940.6 Discrimination in Price Between Localities in the State. No processor, handler, and or distributor shall with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, discriminate in price in the sale of any of the items listed or referred to in Section 940.1 between any of the towns, cities, municipalities or parishes of this State; Provided, that no violation shall result from different prices which reflect, in the case of a processor, the actual transportation cost from point of processing to point of sale, and in the case of a distributor, the actual transportation cost from point of purchase to point of resale. Proof of the advertisement, giving, offer for sale, or sale of any of such products in any one of such towns, cities, municipalities or parishes at prices less than advertised, giving, offered for sale or sold in any other such town, city, municipality or parish by such processor, handler and or distributor, which cannot be accounted for by the difference in such transportation costs, shall be prima facie evidence of a violation of this paragraph.

Section 940.7 Sales by a Non-Processing Retailer. No non-processing retailer shall with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying

competition, or of creating a monopoly, advertise, give, offer to sell or sell within the State of Louisiana, any of the items listed or referred to in Section 940.1 for less than cost, as defined in sub-part (1) of Section 940.2. Proof of the advertising, giving, offer to sell or sale of such products by a non-processing retailer for less than cost to such non-processing retailer shall be prima facie evidence of a violation of this paragraph.

Section 940.8 Sales by a Bulk Milk Handler. No bulk milk handler shall with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, advertise, give, offer to sell or sell within the State of Louisiana, bulk milk, raw or pasteurized, that is intended for the processing of any of the items listed or referred to in Section 940.1 for less than cost to such handler. Proof of the advertising, giving, offer to sell or sale of such bulk milk by a bulk milk handler for less than cost to such bulk milk handler shall be prima facie evidence of a violation of this paragraph.

Section 940.9 Combination Sales Involving Milk Products. No person shall with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor or of destroying competition, or of creating a monopoly, advertise, give, offer to sell or sell any product listed or referred to in Section 940.1 wit any other commodity or service at a combined price which is less than the aggregate of the prices for which such product and other commodity

or services are offered for sale. Proof of the advertising, giving, offering to sell or sale of such product with any other commodity or service at a combined price which is less than the aggregate of the price for which such product and the other commodity or service are offered for sale shall be prima facie evidence of a violation of this paragraph.

Section 940.10 Rebates, Discounts and Other Trade Practices. No milk processor, handler and/or distributor shall with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, give or offer to give any purchaser of any of the items listed or referred to in Section 940.1 from such processor, handler and or distributor, any rebate, discount, free service or services, equipment for rent, any advertising allowances; pay for advertising space, donation, rent on space used by retailer for storing or displaying such milk processor's, handler's or distributor's merchandise, financial aid, free equipment, (except as hereinafter provided) or any other thing of value. Proof of the giving or offer to give any such thing by a processor, handler, and/or distributor shall be prima facie evidence of a violation of this paragraph. No such purchaser shall accept from such processor, handler, and/or distributor any rebate, discount, free service or services, equipment for rent, any advertising allowance, pay for advertising space, donation, rent on space used by retailer for storing or displaying such processor's, handler's or distributor's merchandise, financial aid, free equipment, or any other thing of

value. Proof of the acceptance of such thing by such purchaser shall be prima facie evidence of the violation of this paragraph. In the case of frozen desserts, this paragraph shall not prevent a processor, handler, and/or distributor from providing to a non-processing retailer storage cabinets and display cabinets with restriction for the storage and display of only such processor's, handler's, and or distributor's products, and that nothing herein shall be construed to prohibit the operation of a retail outlet by a processor, handler, and or distributor, or to prohibit the use by such processor, handler, and or distributor in such retail outlet of any equipment or advertising or miscellaneous property owned by such processor, handler, and or distributor, when such retail outlet is under the direct ownership, control and management of such processor, handler, and or distributor. No equipment furnished to a non-processing retailer by a frozen dessert processor, handler, and or distributor shall be used for the storage or display of frozen desserts other than those sold to such non-processing retailer by such frozen desserts processor, handler, and or distributor. The storage or display of products other than frozen desserts received from such processor, handler, and/or distributor, in such storage or display cabinet by a non-processing retailer shall constitute prima facie evidence of the violation of this Section, Provided, that no person shall be deemed to be in violation of this Act where:

(a) Items listed or referred to in Section 940.1 are sold upon final liquidation of any business.

(b) Such items are sold by an officer acting under the direction of any court; or

(c) The price(s) of similar or comparable products are made in good faith to meet legal competition.

(d) To provide that in case a processor, handler and/or distributor sells or disposes of frozen desserts to a non-processing retailer who owns and provides his own refrigerated equipment for the display and/or storage of the products of such processor, handler, and/or distributor, a differential from the list prices of such frozen desserts to such non-processing retailer may be allowed, provided that in no case shall such differential exceed five per cent of the applicable list price for such frozen dessert.

(e) Bids are made in response to invitations from the governing bodies of municipal, parish or parochial schools and contracts and deliveries pursuant thereto.

In the case of inter-handler transfers of products listed or referred to in Section 940.1 not otherwise provided for in this Act, such transfers shall be subject to rules and regulations promulgated by the Commissioner.

Section 940.11 License Required. It shall be unlawful for any processor, handler, distributor, bulk milk handler or non-processing retailer, subject to the provisions of this Act to give, offer to sell or sell within the State of Louisiana at wholesale or retail any product

listed or referred to in Section 940.1 without being duly licensed by the Commissioner. Such license shall be issued by the Commissioner, after application, by each processor, handler, distributor, bulk milk handler, or non-processing retailer on or before 30 days after this Act becomes effective or prior to his engaging in business, and annually thereafter on or before the 1st day of July. Application for such license shall be made on forms provided by the Commissioner. License as herein prescribed, shall be in addition to any other license(s) which are now or may hereafter be required by law and may not be assigned or transferred. In case of persons operating multiple units, a license shall be required for each separate unit. Such license shall be displayed by the licensee at each place of business in the State of Louisiana.

The Commissioner may decline to grant a license to an applicant or shall suspend or revoke the right of a licensee after determination by the Commissioner as hereinafter provided that such processor, handler, distributor, bulk milk handler, or non-processing retailer, has failed to comply with the provisions of this Act.

Section 940.12 Powers and Duties of the Commissioner.

(a) The Commissioner is hereby declared to be the instrumentality of the State for the purpose of administering the provisions of this Act and to execute the legislative intent herein expressed, and is hereby vested with the power to conduct public hearings, to promulgate,

and administer regulations pertaining to the purchases and sales of products listed or referred to in Section 940.1 provided that nothing contained in this Act shall be construed to alter, amend or repeal any of the laws of this State relating to the regulation of public health or to the prevention of fraud and deception, except as herein otherwise specifically provided.

(b) The Commissioner shall initiate proceedings on the complaint in writing of any person or he may initiate proceedings on his own motion for the purpose of investigation and or hearing evidence of the failure or refusal of any person to comply with the provisions of this Act or the rules, regulations, and orders of the Commissioner issued thereunder after giving fifteen days prior notice to the alleged violator as to the date and time fixed for the hearing, and the nature of the charge or charges.

(c) In order to enable the Commissioner to enforce the provisions of this Act, he shall have the power to issue subpoenas requiring the attendance and testimony of, or the production of books and records by processors, handlers, distributors, bulk milk handlers, or non-processing retailers or their employees, producers or their employees, persons having business dealing with processors, handlers, distributors, bulk milk handlers, or non-processing retailers, or other persons whom the Commissioner believes to have information, books or records of importance to him in enforcing the provisions of this Act.

(d) Upon determination of probable cause or justification of complaint of alleged violation of this Act, the Commissioner shall call upon the Attorney General of the State to institute an injunction suit in the District Court for the parish in which the alleged unlawful act or acts took place or in which the defendant resides, is doing business or has his principal place of business, to restrain such violation of this Act as may be revealed by said investigation; and it shall be the duty of the Attorney General to institute and prosecute such injunction suits.

(e) The Commissioner shall have the power to issue license(s) to all licensee(s) as required by this Act. Such license shall be issued for the sum of one dollar annually.

(f) The Commissioner shall adopt such other rules, regulations, and orders necessary or appropriate to enforce the provisions of this Act and not inconsistent with the laws of the State of Louisiana.

Section 940.13 Assessments and Fees. For the purpose of enforcing the provisions of this Act, except those in Section 940.4, the Commissioner shall assess the processor or distributor or handler, licensed under this Act, who processes any of the products listed or referred to in Section 940.1, two cents per hundredweight of all milk or milk equivalents, processed or used to produce products listed or referred to in Section 940.1, or any such lesser amount as may be necessary to cover the cost of administering and enforcing such provisions. For the purpose of enforcing the provisions of Section 940.4 of this Act, the Commissioner shall assess

each processor or handler, distributor, or bulk milk handler an additional one cent per hundredweight on all milk purchased under Section 940.4; each producer shall be assessed one cent per hundredweight on all milk sold to any processor or handler, distributor, or bulk milk handler regulated under the provisions of Section 940.4 of this Act; or such lesser amount as may be necessary to cover the cost of administering and enforcing the provisions of Section 940.4 of this Act. Any fees payable on assessment imposed hereunder shall be payable to the Commissioner on or before the last day of the month following the month during which such products are sold or disposed of. The methods of determining the amounts of assessment and such other information as the Commissioner shall require shall be made on forms provided by the Commissioner.

Section 940.14 Revolving Fund for the Commissioner. All fees and other monies received by the Commissioner pursuant to the provisions of this Act shall be paid to the Commissioner for the use of the Commissioner and shall be deposited in the State Treasury to the credit of a revolving fund for the use of the Commissioner as needed in administration of the provisions of this Act; provided, that no part of this revolving fund shall revert to the general funds of this State, the assessments provided herein shall be adjusted so that this fund does not exceed one hundred fifty thousand dollars ($150,000).

Section 940.15 Penalties for Violation. Violation of this Act shall be a misdemeanor, punishable by a fine not to exceed Five Hundred ($500.00) Dollars in the

discretion of the court. Each day's violation shall constitute a separate offense. In addition to the penalties herein provided, violation of this Act may be enjoined at the suit of any person aggrieved or about to be aggrieved thereby, or at the suit of the Commissioner of Agriculture.

In addition to the penalties as herein provided, any person who shall be injured in business or property by reason of any other person's violation of any of the provisions of this Act may intervene in the suit for injunction instituted pursuant to this paragraph against such other person, or may sue in a separate action such other person in the courts of competent jurisdiction, and shall recover three times the actual damages sustained as a result of such violation, together with the costs of the suit. In addition to the above remedy any such person may in such courts and places sue to enjoin the violation of any of the provisions of said Act.

Section 2: If any clause, sentence, paragraph, section or part of this Act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 3: That all laws or parts of laws in conflict or inconsistent herewith are hereby repealed.

APPENDIX C.

"COST OF DOING BUSINESS"

Allocation to Retail Sales of Milk Products.

The determination of the retailer's proportionate "cost of doing business" allocable to milk products involved incredible complexities. One legal scholar has concluded that the allocation of the "cost of doing business" to particular products is impossible. In a comprehensive analysis of statutes defining the "cost of doing business", the author states:

> ". . . The statutes do not say so, but presumably these elements of the cost of doing business are to be allocated to the particular items sold on some rational basis. The only definition of the cost of doing business found in most statutes is tautological, but they customarily list the elements entering into this cost, such as labor, salaries, interest, depreciation, rent, selling costs, maintenance of equipment, delivery costs, credit losses, licenses, taxes, insurance and advertising.
>
> "With implicit recognition that few businessmen are able to prove the share of the overhead borne by a particular item, the statutes establish rebuttable presumptions. These take two forms. One of them merely establishes the cost of doing business at a stated percentage of invoice cost, to be applied to all items in the absence of proof of the actual cost. . . .
>
> "There are two obstacles which prevent the total cost of an article in a retail store from being fully

and accurately determined. The first of these is the complete absence of any logical connection between the handling of that article and certain classes of expense which are part of the costs of the enterprise. Costs of this kind are often called 'joint costs,' and many accounting authorities refuse to make any attempt to allocate them to individual items of merchandise. Thus it would be impossible to say how much of a store manager's salary ought to be allocated to the cost of a bag of sugar, as against a bag of flour. The same would be true of the cost of heating and lighting the store, and the cost of buying and maintaining a parking lot for the convenience of customers. There is thus a large class of costs then which can never be related in any rational manner to the particular articles sold.

"The second obstacle to a full calculation of costs for the retail grocery store, (which we may assume is the enterprise most commonly concerned with the impact of these statutes) is that it is impossible as a practical matter to determine how much of the cost of doing business should be allocated to a particular item, even when the elements of that cost have some relation to the handling of a particular item. For example, one could logically say that the cost of frozen orange juice should include the cost of refrigeration, whereas the cost of canned orange juice would not. And the cost of meat would include a factor representing the allocation of butcher's and meat cutter's salaries. But any retailer who attempted to compute costs in this much detail would no longer have to worry about the statutes because he would be too busy doing his accounting to make any sales. In other words, these

statutes are commanding the seller of goods to keep records and make computations which no seller could do and remain in business, and which in fact no seller does do."

* * *

"But this is not the whole story. What about the presumptions? By imposing the requirement of a fixed mark-up over invoice cost, they relieve the retailer or wholesaler of this impossible burden of cost accounting, and the argument goes, make it easy for him to know when he is violating the statute. This is true but open to several objections. First, the mark-ups arrived at in this manner . . . have nothing whatever to do with the cost of selling the particular article. . . . Thus the percentage mark-up requirement assumes that each item sold should bear the same proposition of the total cost of doing business, regardless of what the actual cost of selling that particular item might be This may be a convenient method of arriving at a selling price, but it has nothing to do with the cost of the individual item sold.

* * *

"The foregoing paragraphs are enough to show that the use of 'cost' as a criterion of price in these statutes is largely a fiction. In few, if any, cases will the defendant be able to show what the true cost of selling an item is. The court will then apply the presumption that 'cost' is invoiced price plus the statutory percentage . . . The writer has found few reported cases brought under these statutes in which the actual cost of selling an item was proved. In nearly all cases the presumption was the basis for the judgment. This makes it

plain beyond question that *references to cost are camouflage, used to shelter the statute from constitutional attacks.* The rule announced by these statutes therefore is that sales at prices less than invoice plus a *mandatory* percentage (with the wrongful intent) are unlawful. Or, to put it another way, all sellers must mark up their goods at the same rate.

"It follows from this that the constitutional question raised is whether this uniform markup is valid, not whether sales below cost can be forbidden. If the question were put that way, there seems little doubt that the statutes would be held unconstitutional, on the ground that they prevent the efficient merchant with low costs from competing successfully with his less efficient rivals. Or perhaps it would be more accurate to say that they prevent him from passing his cost savings on to his customers in the form of lower prices. If he wishes to attract business from his competitors, he must do so by means other than lower prices, such as trading stamps, giveaways, advertising, the offering of various services such as music in the supermarket, and other gimmick. *In short the effect of these statutes is to forbid competition in prices* and to encourage non-price forms of competitions. *The result is that the benefits usually attributed to the competitive-system, lower prices to the consumer and an efficient allocation of economic resources, are seriously prejudiced."*

Clark, Statutory Restrictions on Selling Below Cost, 11 Vand. L. Rev. 105, 120 et seq. (Dec. 1957).

Professor Taggert's prior exhaustive study of minimum price legislation confirms these statements. See Taggert, *The Cost Principle on Minimum Price Legislation*, U.Mich. Press (1938). Professor Taggert's thesis states:

> "A realistic approach to the problem of enforcing prohibitions of sales below cost requires some method of indicating to those at whom the laws are directed what cost is and how it is to be ascertained. The term 'cost' is not self-explanatory. Cost accountants themselves differ widely in their conceptions of cost, and it is hardly to be expected that lawyers and judges without accounting training will agree any more fully, unless definitions and rules for the ascertainment of cost have been set up in advance and unless these definitions and rules are sufficiently precise to be capable of being followed and sufficiently reasonable so that neither seller nor buyer is injured by being forced to abide by them. While the Federal Trade Commission can afford to take the time and effort to consider the cost computations of each individual respondent under his own accounting system and to compare such computations with the general body of cost accounting doctrine (such as it is) to see if they are proper, it is obviously impossible for local courts in attempting to uphold state legislation to do likewise.
>
> * * *
>
> "The individuality of the cost, then, is the feature which makes this type of legislation seem reasonable. The result cannot be price-fixing, as was carefully explained in Congress when the NIRA was under discussion. 'Price-fixing' seems to be

abhorent to the very legislators who vote cheerfully for acts similar to the one cited. *Yet the basing of minimum prices on individual cost in any literal sense is so utterly impracticable that price-fixing is the inevitable result. Such laws simply cannot be administered without a degree of price-fixing in which individual costs and circumstances must of necessity be lost sight of.*

* * *

"Thus a law which started out to forbid sales below individual cost gradually assumes the form of a rule forbidding sales of goods below a built-up 'cost' *which will be higher than the actual cost of efficiently managed concerns and high enough to 'put an umbrella over' those who are loudest in their demands for protection*—the relatively inefficient members of every trade."

Taggert, op. cit. supra.

These general conclusions with respect to the impossibility of accurately allocating the cost of doing business to particular items also has been expressed by numerous authorities in the field of cost accounting. Leading authorities concede that there is no recognized method for the accurate or precise allocation of "joint costs". See *Retailing Principles and Methods*, by Duncan and Phillips, and *Practical Distribution Cost Analysis*, by Longman and Schiff. Blocker and Weltman's basic text entitled *Cost Accounting* contains the following typical statement:

"Cost accounting is not an exact science, nor does it produce accurate results according to the stand-

ards of statistical analysis. The existence of joint cost in both the production and the selling divisions of business enterprises makes it impossible to compute accurate costs for departments, services, or units of production. Most departments of operations produce two or more products with the same labor, equipment, and supervisory force while neither factory overhead nor selling overhead costs can be identified specifically with particular activities or products. As a result, *it is necessary for the cost accountant to adopt various bases for the distribution of joint costs, particularly overhead costs, to departments, services, jobs, and units. These bases . . . . are at best 'means to an end' rather than scientific or logical criteria for cost assignment. . . .*"

	LOUISIANA	ARKANSAS	MISSISSIPPI	TEXAS	TOTAL U.S.
QUANTITY (MIL. LBS.)					
1945	259	355	523	1,550	68,929
1946	245	342	502	1,500	69,619
1947	285	330	520	1,470	70,559
1948	325	370	550	1,540	69,010
1949	370	440	615	1,670	73,290
1950	390	450	640	1,970	74,205
1951	410	450	635	1,850	74,480
1952	445	490	685	1,900	77,301
1953	480	600	850	2,020	84,567
1954	530	630	830	2,090	87,874
1955	555	698	863	2,192	90,301
1956	600	764	934	2,226	95,362
1957(1)	646	787	985	2,329	99,628
% Increase - 1957 over 1945	149%	122%	88%	50%	43%
PRICE PER 100 LBS. (DOLLARS)					
1945	3.85	3.25	3.40	3.55	3.19
1946	4.93	4.14	4.25	4.39	3.99
1947	5.71	4.58	4.71	5.50	4.27
1948	6.26	5.22	5.20	6.11	4.98
1949	5.75	3.97	4.34	5.67	3.95
1950	5.61	3.96	4.26	5.26	3.89
1951	6.14	4.70	5.02	6.18	4.58
1952	6.55	5.16	5.37	6.99	4.85
1953	6.24	4.55	4.63	6.10	4.32
1954	5.67	4.06	4.26	5.46	3.97
1955	5.53	4.17	4.39	5.64	4.00
1956	5.71	4.25	4.47	5.75	4.14
1957(1)	5.63	4.23	4.50	5.56	4.20
% Increase - 1957 over 1945	46%	30%	32%	57%	32%
CASH RECEIPTS (1,000 Dollars)					
1945	9,972	11,538	17,782	59,025	2,195,915
1946	12,079	14,159	21,335	69,359	2,780,036
1947	16,274	15,114	24,492	80,859	3,014,799
1948	20,345	19,314	28,600	94,094	3,364,385
1949	21,275	17,028	26,691	94,689	2,895,535
1950	21,879	17,320	27,264	99,362	2,896,496
1951	25,174	21,150	31,977	114,330	3,412,603
1952	29,148	25,284	36,794	130,910	3,752,084
1953	29,952	27,300	39,355	123,220	3,450,716
1954	30,051	25,578	35,358	114,114	3,487,085
1955	31,246	29,107	37,986	117,989	3,638,208
1956	34,260	32,566	41,750	127,995	3,946,277
1957(1)	36,370	33,290	44,325	129,492	4,143,429
% Increase - 1957 over 1945	265%	189%	149%	119%	89%

(1) Preliminary Figures

Does not include milk sold to plants and dealers as farm cream.

Does not include milk and cream retailed by farmers.

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Source: Dairy Statistics, U.S. Department of Agriculture, October 1957, pp. 101, 125, 134, 135, 136.

Milk - Farm Production, Disposition, And Income, 1956-57, U.S. Department of Agriculture, pp. 12, 15.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1959

No. 423

SCHWEGMANN BROTHERS GIANT SUPER MARKETS,

Appellant,

versus

SIDNEY J. McCRORY, COMMISSIONER OF AGRICULTURE AND IMMIGRATION OF THE STATE OF LOUISIANA,

Appellee.

BLU-RIBON DAIRIES, INC., ET AL.,
INTERVENORS.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF INTERVENORS; AND BRIEF IN SUPPORT THEREOF.

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Alexandria, Louisiana.

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Appellee.

(BLU-RIBON DAIRIES, INC., ET AL., INTERVENORS)

MOTION TO DISMISS OR AFFIRM ON BEHALF OF INTERVENORS; AND BRIEF IN SUPPORT THEREOF.

Blu-Ribon Dairies, Inc., and twenty other producers and processors of milk, milk products and frozen desserts, move to dismiss appellant's appeal from the final

judgment and decree of the Louisiana Supreme Court rendered in the above case, or to affirm said judgment on the grounds that the issues presented by appellant are so unsubstantial and frivolous as not to warrant further argument.

OPINION BELOW.

The opinion of the Supreme Court of Louisiana from which appellant seeks to appeal is reported in 112 So. (2d) 606 under the title *Schwegmann Brothers Giant Super Markets v. Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana.*

QUESTIONS PRESENTED FOR REVIEW.

The questions presented in appellant's Notice of Appeal are:

(1) Whether Act 193 of 1958 creates a presumption of guilt in violation of the Due Process guarantee of the Fourteenth Amendment to the United States Constitution.

(2) Whether it violates the Due Process guarantee by virtue of being arbitrary, unreasonable and inappropriate for its alleged purpose.

(3) Whether it violates Due Process as an unlawful delegation of legislative power.

In its Jurisdictional Statement, appellant has advanced the additional contention (not covered in its Notice of Appeal) that Act 193 of 1958 is unconstitutional in its entirety.

STATUTE INVOLVED.

The statute involved is Act 193 of 1958 of the Louisiana Legislature generally known as the Orderly Milk Marketing Act. A copy of the act appears as Appendix B on page 44 of appellant's Jurisdictional Statement.

STATEMENT OF THE CASE.

The statute involved grew out of a condition in Louisiana under which large chain stores engaged in unfair and disruptive trade practices which threatened the economic existence of small independent operators who were in the business of selling milk, milk products and frozen desserts. The Supreme Court of Louisiana in commenting on the statute referred to the preamble in these words:

> "It contains a preamble declaring the Legislature's recognition of the development in the state of unfair competition and trade practices in the sale and distribution of those products, its further recognition of the necessity to protect and preserve orderly marketing and to prevent certain unfair trade and marketing practices, and expressing the lawmakers' intent to prevent the economic destruction of many dairy farmers and others dealing in said products because of discriminatory trade practices engaged in by certain financially strong business organizations to stifle competition — thus presenting a situation detrimental to the health, welfare and economy of the people of this State." (112 So. (2d), 608)

The Supreme Court of Louisiana further said in its opinion:

> "The market practices which led to this enactment are disclosed by the record wherein is revealed a system developed by plaintiff under which it received rebates or discounts from the invoice prices in addition to trade concessions, such as contributions for its free use of refrigeration, display and storage equipment, and advertising furnished and paid for by those from whom it bought dairy products." (112 So. (2d) 610)

The Supreme Court of Louisiana also quoted from the decision of the Trial Judge to the effect that the evidence convincingly sustained the well-known fact that the powerful combination of volume buying and adequate resources had created a condition which the small producer, processor and retailer could not meet. The beneficial effects of the act were then stated in these words:

> "It is further shown that the short period of a few months after August 1, 1958, when Act 193 went into effect, has brought equal and wholesome relief from this disruptive pressure which brought about its enactment." (112 So. (2d) 611)

ARGUMENT.

The points raised by appellant in its Notice of Appeal to this Court are without merit and have no substantial basis. We shall take them up in the order which they are presented by appellant.

(1) It is claimed that Act 193 of the Louisiana Legislature of 1958 creates a presumption of guilt or lacks the certainty required in a criminal statute, and this violates the Due Process clause of the Fourteenth Amendment to the United States Constitution. This contention is completely without foundation as shown by the opening sentence in that section of the statute dealing with violations which reads as follows:

> "Section 940:15. Penalties for Violation. Violation of this Act shall be a misdemeanor, punishable by a fine, not to exceed Five Hundred ($500.00) Dollars **in the discretion of the court.**" (See Appendix B, page 62, of appellant's Jurisdictional Statement.)

The very language shows that any punishment is by court action. The Supreme Court of Louisiana in commenting on this point said:

> "It is further objected by plaintiff that the Act creates a presumption of guilt (ignoring the presumption of innocence fundamental under our law) in violation of due process guarantees of both Federal and State Constitution; that a series of new crimes has been created by Sections 940.5 through 940.10, in that the doing of any one of a number of otherwise harmless acts with the intent or the effect of injuring a competitor, destroying competition, creating a monopoly, etc., is a crime, and while the intent or effect are necessary before the act becomes criminal, those elements are supplied by making the commission of the act prima facie evidence of violation of the section—the fatal defect being the pre-

sumption of the wrongful intent or injurious effect which are essential elements of the crime.

"Reference to the wording of the various provisions complained of readily shows that counsel's analysis is not wholly accurate; they declare that none of the groups or individuals (as therein defined) who handle the products covered by the Act, 'with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor; or of destroying competition, or of creating a monopoly', shall do a described thing; and proof of the doing of the thing 'shall be prima facie evidence of a violation of this Section.'" (112 So. (2d) pp. 617 and 618)

The above disposes of appellant's first contention.

(2) It is claimed that the statute violates the Due Process guarantee by being arbitrary, unreasonable and inappropriate for its alleged purpose. This attack is completely lacking in the required specificity. The Supreme Court of Louisiana answered this contention on pages 616 and 617 of its decision in 112 So. (2d), where among other things the Court said:

"This Court, observing that the simple question posed (i.e., constitutionality vel non of the Unfair Sales Act) had been answered adversely to the defendant's contention by the courts of thirty states which had reviewed the similar acts adopted by their respective legislatures, and that the underlying principle upon which those decisions are based has the support of opinions of the Supreme Court of

the United States, quoted at length from 'the leading case on this subject, Nebbia v. People of State of New York, 291 US 502, 54 S. Ct. 505, 516, 78 L. Ed. 940, 89 ALR 1469', which posed the question of the constitutionality of a New York milk control law adopted for the purpose of thwarting harmful competition, and contained many pertinent observations that were equally applicable in the case then under consideration. Among these were that 'So far as the requirement of due process is concerned, * * * a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.'" (112 So. (2d) 616)

There are many decisions, both state and federal, where the constitutionality of a statute similar to the Orderly Milk Marketing Act have been held constitutional and valid legislation. Among these are *Nebbia v. People of the State of New York*, 291 U. S. 502, 78 L. Ed. 940; *United States v. Rock Royal Corporation*, 307 U. S. 533, 83 L. Ed. 1446; *Louisiana Wholesale Distributors Assn. v. Rosenzweig*, 36 So. (2d) 403.

In the *Rosenzweig* case *supra*, the Supreme Court of Louisiana discussed at length the monopolistic dangers inherent in the concentration of retail distribution in the hands of large and richly financed organizations seeking to secure a larger share of the retail market by unfair

trade practices; and the necessity of protecting the small independent retailers from various types of cut-throat competition. As to the right of the courts to prevent unfair sales practices, the Supreme Court of Louisiana said on page 403:

> "The simple question posed in this case has been answered adversely to the contention of the appellant by the courts of the thirty states of the Union that have had occasion to review similar acts adopted by their respective legislatures." (Citing numerous State cases.)

The Court further said on page 403:

> "The underlying principle upon which these decisions are based has the support of the decisions of the Supreme Court of the United States." (Citing numerous decisions of the U. S. Supreme Court.)

(3) It is claimed by appellant that Act 193 of the Louisiana Legislature of 1958 is an unlawful delegation of legislative power. The contention that the statute delegates legislative power borders on the frivolous. The Supreme Court of Louisiana in answering this contention made the following comment:

> "Plaintiff's counsel have been diligent in envisaging situations which they consider possible and view with alarm, but we think such fears are unwarranted at this time in the absence of a shred of showing that such happenings, contrary to the intent and purpose of the enactment, might occur. An Act of the Legislature is presumed to be legal until it is shown to be unconstitutional, and the

> lawmakers would indeed be hard put to draft legislation were it necessary to cover every conceivable contingency or to foresee and prohibit acts of an irresponsible administrator. The purpose and intent of the subject statute is clearly expressed, and the Commissioner of Agriculture, specifically declared to be the instrumentality of the State for the purpose of administering its provisions, is given the duty 'to execute the legislative intent herein expressed.'" (112 So. (2d) 615)

The Supreme Court of the United States has on numerous occasions declared that legislative power is not delegated when the lawmaking body leaves it to administrative officers to carry out the details. The following is an expression from *United States v. Rock Royal Cooperative, supra:*

> "From the earliest days the Congress has been compelled to leave to the administrative officers of the government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled therefore that it is no argument against the constitutionality of an Act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied." (83 L. Ed. 1470)

In *Currin v. Wallace*, 306 U. S. 1, 83 L. Ed. 441, involving the enforcement of the Federal Tobacco Inspection Act, the Court answered the argument about uncon-

stitutional delegation of legislative power by this statement:

> "The argument that there is an unconstitutional delegation of legislative power is equally untenable. This is not a case where Congress has attempted to abdicate or transfer to others the essential legislative functions with which it is vested by the Constitution. We have always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. . . . In such cases a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." (83 L. Ed. 451)

(4) Appellant contends generally that Act 193 of 1958 is unconstitutional in its entirety. This allegation is a meaningless catch-all. The argument is made that the invalid portions are so interrelated with the unchallenged portions that the entire statute is invalid. Under appellant's theory the disruptive sales practices described in Section 940:2 of the statute are meaningless, such as discrimination in prices, giving or offering discounts and rebates, making payments of money, extending of unusual credit, making gifts or loans, and all the other practices denounced in this section. The statute has the standard severability clause. Section 2 of the Act provides that if any clause, sentence, paragraph or other part thereof is declared invalid by any Court of competent jurisdiction, this shall not affect, impair or invalidate the remainder. Further discussion of this point appears unnecessary, as its lack of merit is apparent.

CONCLUSION.

It is a general rule often recognized by this Court that in respect to the construction of State statutes, the State court's views are completely non-reviewable by the Supreme Court. It has been a principle consistently adhered to by the Supreme Court of the United States, that it will not review a State court judgment based upon an adequate and independent non-Federal ground even though a Federal question be involved and perhaps wrongly decided. In this case, of course, is no substantial Federal question but merely a formal one that was presented in the pleadings but not substantiated by anything in the record. In *Palmer Oil Corporation v. Amerada Petroleum Corporation*, 343 U. S. 390, 96 L. Ed. 1022, the Court, citing numerous authorities, said:

> "In the light of our previous decisions, appellants have failed to raise any substantial federal questions and the appeals are therefore dismissed." (96 L. Ed. 1026)

Again in *Herb v. Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, the Court said:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of State courts that rest on adequate and independent state grounds. . . . Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions." (89 L. Ed. 794)

In *Guaranty Trust Company v. Blodgett*, 287 U. S. 509, 77 L. Ed. 463, Item 2 of the Syllabus reads as follows:

> "The Supreme Court of the United States is bound by the construction given to a State statute by the highest court of the State as though the meaning so fixed had been expressed in the statute in specified words."

May we call attention to the situation that exists affecting the twenty-one intervenors here, and many more in the industry who are affected by this litigation. The importance of this case to them cannot be overestimated. The decision here may be the means by which they will survive as dealers in milk, milk products and frozen desserts or perish economically. As alleged in their intervention, they depend upon their respective occupations for a livelihood and have devoted years of time and effort, and undergone great expense and sacrifice to promote the successful development, maintenance and operation of their businesses. They are the ones who will be vitally affected by the result and unless their rights are adjudicated promptly, any relief eventually granted may be too late. Their situation illustrates the familiar slogan that "Justice delayed is justice denied."

The decision of the Supreme Court of Louisiana discloses a careful analysis of the issues, logical reasoning, and proper application of the jurisprudence, both State and Federal. Appellant would make it appear that there lurks an important question of Federal law which the Supreme Court of the United States should settle, but this is not true.

The motion to dismiss or affirm should be granted, and we so pray.

Respectfully submitted,

s/

FRANK H. PETERMAN,
Counsel for Intervenors,
909 Sixth Street,
Alexandria, Louisiana.

CERTIFICATE.

I hereby certify that a copy of the above motion to dismiss or affirm and brief in support thereof have been served upon all opposing or interested counsel by depositing copies in the United States mail, postage prepaid and properly addressed.

Alexandria, Louisiana, October 19, 1959.

s

FRANK H. PETERMAN

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In the Supreme Court of the United States

OCTOBER TERM - 1959

SCHWEGMANN BROTHERS
GIANT SUPER MARKETS, APPELLANT,

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Motion to Dismiss or Affirm on Behalf of Appellee, Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana.

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No. 423

In the Supreme Court of the United States

OCTOBER TERM - 1959

SCHWEGMANN BROTHERS
GIANT SUPER MARKETS, APPELLANT,

v.

SIDNEY J. MCCRORY, COMMISSIONER OF AGRICULTURE
AND IMMIGRATION OF
THE STATE OF LOUISIANA, APPELLEE.

Motion to Dismiss or Affirm on Behalf of Appellee, Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana.

Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana, through Jack P. F. Gremillion, duly elected and qualified Attorney General of the State of Louisiana, moves to dismiss appellant's appeal from the final judgment and decree of the Louisiana Supreme Court rendered in the above case or to affirm said judgment on the grounds that the issues presented by appellant do not present a substantial federal question, and that the judgment of the Supreme Court of the State of Louisiana rests on an adequate, non-federal basis, and that the federal question passed on by the Supreme Court of Louisiana, though not a substantial one, was expressly passed on by that court.

OPINION BELOW

The opinion of the Supreme Court of Louisiana from which appellant seeks to appeal is reported in

112 So. 2d 606, under the title of "Schwegmann Brothers Giant Super Market v. Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana".

QUESTIONS PRESENTED FOR REVIEW

The questions presented in Appellant's Notice of Appeal are:

1. Whether Act 193 of 1958 creates a presumption of guilt in violation of the Due Process guarantee of the Fourteenth Amendment to the United States Constitution.
2. Whether it violates the Due Process guarantee by virtue of being arbitrary, unreasonable and inappropriate for its alleged purpose.
3. Whether it violates Due Process as an unlawful delegation of legislative power.
4. Whether Act 193 of 1958 is unconstitutional in its entirety.

STATUTE INVOLVED

The statute involved is Act 193 of 1958 of the Louisiana Legislature generally known as the Orderly Milk Marketing Act, supplementing Part VII of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950. A copy of the Act appears as Appendix B on page 44 of Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

The statute involved grew out of the condition in Louisiana under which large chain stores and pro-

cessors and distributors of milk and ice cream engaged in unfair and disruptive trade practices which threatened the existence of small independent milk producers and operators engaged in the business of producing milk, selling milk and ice cream products and frozen desserts. The Louisiana Legislature realized that a crucial situation existed in Louisiana and passed Act 193 of 1958 to rectify this situation.

The Supreme Court of Louisiana also recognized the well-known fact that powerful combinations of volume buying and the use of discriminatory and unfair trade practices created a condition which the small producer, processor and retailer could not meet.

Schwegmann Brothers Giant Super Markets v. Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana, 237 La. 768, 112 So. 2d 606.

ARGUMENT

The points raised by the appellant in its Notice of Appeal to this court are without merit and have no substantial bases, either in law or in fact. We shall not re-enumerate these points, but we feel that the Supreme Court of Louisiana in its decision, which is contained in Appellant's Jurisdictional Statement and marked as "Appendix A", has adequately answered all of these contentions.

There are many decisions, both state and federal, where the constitutionality of statutes similar to Act

193 of 1958 have been held constitutional and valid legislation.

Nebbia v. People of the State of New York, 291 U.S. 502, 78 L.Ed. 940; *United States v. Rock Royal Corporation*, 307 U.S. 533, 83 L.Ed. 1446; *Louisiana Wholesale Distributors Assn. v. Rosenzweig*, 36 So. 2d 403.

The Louisiana Supreme Court, in deciding the instant case below, stated:

> "The case of *Currin v. Wallace*, supra (83 L.Ed. 441), has important points of similarity to the instant case; the Secretary of Agriculture, authorized by Congress to investigate the handling, inspection and marketing of tobacco and to establish standards by which type and grade might be determined, was empowered to designate the markets in which tobacco was to be bought and sold *if* two-thirds of the growers, voting at a special referendum, favored it, and that provision was attacked as an unconstitutional delegation of legislative power to individuals; but the Court declared that the required referendum was merely a condition under which the Secretary was to be bound in the exercise of his administrative powers under the Act. 'The intention of Congress is clear that markets thus ascertained shall be designated subject to the prescribed conditions and as rapidly as facilities for inspection are available. We find no unfettered discretion lodged with the administrative officer. The requirement of a referendum, as already noted, calls for the expression of the wishes of the growers and the Secretary

acts merely as an administrative agent in conducting the referendum.' (83 L.Ed. at page 452.)"

CONCLUSION

It is respectfully submitted that an examination of the decision of the Supreme Court of Louisiana and the authorities cited heretofore will show:

1. That this appeal does not present a substantial federal question:

2. That the federal question sought to be reviewed by appellant was not a substantial federal question and was expressly passed on by the Supreme Court of the State of Louisiana; and

3. That the judgment of the Supreme Court of the State of Louisiana rests on an adequate, non-federal basis.

It is further submitted that this Motion to Dismiss or Affirm should be granted, and it is so prayed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above Motion to Dismiss or Affirm has been served upon all opposing or interested counsel by depositing copies in the United States mails, postage prepaid and properly addressed.

Baton Rouge, Louisiana, October , 1959.

JACK P. F. GREMILLION
Attorney General
State of Louisiana